IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 307 of 2002

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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MANOJBHAI PUNABHAI VASAVA - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MS REKHA H KAPADIA for Appellant.
MR RC KODEKAR, APP for Opponent.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 25/09/2006

ORAL JUDGMENT

(**Per : HONOURABLE MR.JUSTICE K.A.PUJ**)

1. The present appeal is filed by the appellant - original accused in Sessions Case No. 226 of 1998 against the judgment and order dated 23.05.2001 passed by Learned Additional Sessions Judge, Bharuch convicting the accused for an offence punishable under Section 376 of the Indian Penal Code and sentencing him for rigorous imprisonment of 10 years with fine of Rs. 5,000/- and in default thereof, to undergo simple imprisonment of one year.

2. The brief facts giving rise to the present appeal are that the complainant is the mother of the prosecutrix. Both the complainant and the appellant – accused are belonging to the same village, namely, Aluj, Tal. Ankleshwar, Dist. Bharuch. The case of the prosecution

is that the complainant have got five children and the prosecutirxwas eight years old on the date of occurrence of the event i.e. 20.07.1998. That on that day, she was out and her daughter was playing in the compound and her elder daughter was sleeping in the house as she was suffering from conjectivities. At that time, her elder daughter came to the complainant and informed her that the prosecutrix was weeping. On asking her, the prosecutrix has informed that one Manojbhai Punabhai Vasava – accused has induced her after giving chocolate and he has taken her to a place near her house. He thereafter let her down on the earth and took out her paijama. He also took out pent and committed rape on her. She thereafter took per daughter to the police station for lodging the complaint. The prosecutrix was also sent for medical treatment to the hospital and Dr. Jyoti Gupta has examined her. A complaint was filed for committing a rape on the prosecutrix and for the offence under Section 376 of the Indian Penal Code.

3. Pursuant to the registration of FIR, investigation was put into motion. During the course of investigation, statements of the witnesses were recorded, panchnama

of the scene of offence was prepared, clothes of the accused as well as victim were also recovered by drawing a panchnama, which were sent to F.S.L. for chemical analysis. After obtaining F.S.L. Report and the certificate issued by the Doctor and also obtaining birth certificate of the victim, since sufficient incriminating evidence was found against the accused, he was charge-sheeted in the Court of learned Judicial Magistrate First Class, Ankleshwar.

4. As the offence under Section 376 of IPC was exclusively triable by the court of Sessions, learned JMFC, Ankleshwar committed the case to the Sessions Court, Bharuch. The learned Special Judge, Bharuch to whom the case was made over for trial, framed charge against the accused for commission of the offence punishable under Section 376 of IPC.

5. The charge was read over and explained to the accused as the accused pleaded not guilty to the charge. He was put to trial and tried by the learned Special Judge, Bharuch in Sessions Case No. 226 of 1998.

6. To prove the culpability of the accused, prosecution has in all examined as many as 9 witnesses, details of which are given in paragraph 4 of the impugned judgment. The prosecution has also produced 11 documents and relied upon the contents of the same, details of which are enumerated in paragraph 5 of the impugned judgment and order.

7. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge, Bharuch explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement, as required under Section 313 of the Code. In their further statement, the accused denied the case of the prosecution by reiterating that he has been falsely implicated.

8. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Additional Sessions Judge has held that the victim was

subjected to rape by the accused and the prosecution has established that the charge levelled against the accused was proved beyond reasonable doubt and, therefore, the accused was held guilty of the offence of committing rape and, therefore, he was convicted of the said offence.

9. Thereafter, the learned Additional Sessions Judge, Bharuch heard the accused and his advocate on sentence and looking to the gravity of the offence committed by the accused and looking to the circumstances, the accused was sentenced to suffer rigorous imprisonment of 10 years with fine of Rs. 5,000/- and in default thereof, to undergo simple imprisonment of one year for an offence punishable under Section 376 of the Indian Penal Code. The learned Additional Sessions Judge has also awarded compensation of Rs. 3,000/- to the victim and if the appellant makes the payment of Rs. 5,000/- in that case, the amount of Rs. 3,000/- should be paid out of the said amount.

10. Being aggrieved by the said judgment and order, the accuse has filed this appeal through Jail.

11. Ms. Rekha H. Kapadia, learned advocate appearing for the appellant has taken us through the oral as well as documentary evidence which are on record and also assailed the judgment and order of the learned Additional Sessions Judge dated 23.05.2001. She has submitted that the learned Sessions Judge has erred in convicting the appellant – accused though there are no ample or cogent evidence showing his guilt in the matter. She has further submitted that the learned Additional Sessions Judge has failed to appreciate that the appellant is innocent and has not committed the alleged offence. The medical evidence does not support the case of the prosecution and on the basis of the said evidence, it cannot be said that the appellant – accused has committed any offence. She has further submitted that the learned Additional Sessions Judge has not properly appreciated the evidence led by Dr. Jyoti Gupta. The Panchas have turned hostile and did not support the case of the prosecution. The learned Additional Sessions Judge, Bharuch has not properly appreciated the evidence of the Doctor and certificate issued by the Medical Officer. She has further submitted that the

Panchnama of scene of offence Exh. 24 is not trust-worthy and reliable. It appears that the same was prepared with a specific intention. The place was not isolated one and the time was about 7.30 in the evening and hence, there was some day light and it is not possible for any one not to be witnessed of the said incident. She has further submitted that the place of incident was hardly 15 feet away from the house of the complainant. The prosecutrix has gone to her house after the above incident without any help from anyone which is not possible. Normally, in the case of a rape, even the accused is also examined by the prosecution. No medical report of the accused is furnished in the Court. She has further submitted that the accused is also of 17 years old and looking to his body structure, he is not in a position to commit rape. She has, therefore, submitted that offence of rape under Section 376 is not proved against the accused. The clothes worn by the prosecutrix were washed away by the complainant and hence, no blood stains or semen were found. Despite this fact, it was stated in the evidence that such blood stains and semen were found which is not possible. She has further submitted that the evidence of the

Investigating Officer is also not reliable and in his cross-examination, he has simply stated that he is deposing on the basis of the case papers which he has brought with him. The Doctor has also specifically stated that there was no sign of successful inter-course. She has further submitted that the prosecutrix has told the story for the first time to her elder sister and she has not been examined by the prosecution. Other two brothers of the prosecutrix though they were in the house were not examined. She has, therefore, submitted that the case against the appellant – accused was not proved beyond reasonable doubt. She has further submitted that there was a malafide intention for filing the false complaint against the accused as the accused has gone to the complainant's house some four to five days back to take berry (Bor) and the complainant has not given money to the accused and hence, he has refused to go on work. The complainant, therefore, told the accused that if he would not come, she would file a false complaint against him and send him behind the bar. As a result of this incident, a false case was filed against the accused and he was wrongly implicated in this case. She has, therefore, submitted that the accused may be acquitted

from the charge levelled against him.

12.Mr. R.C. Kodekar, learned Additional Public Prosecutor appearing for the State, on the other hand, has supported the case of the prosecution and submitted that no interference is called for in the judgment and order of conviction passed by the learned Additional Sessions Judge, Bharuch. No case is made out by the appellant to take any different view in the matter. He has further submitted that the prosecutrix in her deposition Exh. 12 has clearly stated that the accused has committed rape. She has narrated the entire incident in her deposition. On the basis of this deposition, the charge of rape is proved against the accused and he has rightly been convicted. The prosecutrix was minor aged about 8 years at the time of incident. This fact is proved on the basis of the Certificate issued by the Principal of Taluka Panchayat, Ankleshwar. He has further submitted that the charge regarding rape has also been proved on the basis of F.S.L. Report produced by the prosecution.

13.Mr. R.C. Kodekar has relied on the decision of the Hon'ble Supreme Court in the case of **Ranjit Hazarika**

V/s. State of Assam, (1998) 8 S.C.C. 635 and in the case of **State of Madhya Pradesh V/s. Dharkole alias Govind Singh and others, 2004 AIR SCW 6241** for the proposition that where the eye-witnesses account is found credible and trustworthy, medical opinion to alternative possibilities is not accepted as conclusive.

14. Mr. Kodekar has further submitted that conviction can be based on the oral testimony of the prosecutrix without insisting for corroboration if the same inspires confidence. In this regard it would be advantageous to refer to the decisions of the Supreme Court in the case of **Kamalanantha v. State of Tamil Nadu, (2005) 5 SCC 194, State of MP v. Dayal Sahu, (2005) 8 SCC 122, State of UP v. Pappu (2005) 3 SCC 594 (supra)**. In the above referred three judgments, the Supreme Court has ruled that conviction can be based on the testimony of prosecutrix alone, without insisting for corroboration if the same inspires confidence.

15. Based on the aforesaid submissions, facts of the case and the authorities relied upon by him, Mr. Kodekar has urged that the learned Additional Sessions Judge has

rightly convicted the accused for the offence committed by him and no interference is called for by this Court especially when a well-reasoned order has been passed considering all the aspects of the matter. He has, therefore, submitted that the appeal filed by the appellant – accused deserves to be dismissed.

16. We have considered the submissions advanced by Ms. Rekha H. Kapadia, learned advocate appointed by Legal Aid on behalf of the appellant and Mr. R.C. Kodekar, learned Additional Public Prosecutor appearing for the respondent – State of Gujarat at length. We have also undertaken a complete and comprehensive exercise of appreciating all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections.

17. In order to find out whether the prosecution has established the charge against the accused beyond reasonable doubt and whether the learned trial Judge has recorded a just and correct conclusion holding the accused guilty, we may first advert to the oral testimony

of the prosecutrix.

18.The prosecutrix has been examined as PW 5 – Exh. 12.In her oral testimony, she has inter alia stated that the incident was taken place on 20.07.1998 and it was about 7.00 O'clock in the evening. She was playing in the compound near her house and her mother has gone out for taking milk. When she was playing, the accused has come there and he has induced her by giving chocolate and she was taken in the adjoining place to her house. She has narrated the entire incident as to how the rape was committed. She withstood the test of cross-examination made by the learned advocate of the accused and nothing substantial has been brought out from her cross-examination which would impeach her credibility.

19.In order to get corroboration to the evidence of prosecutrix, the prosecution has relied upon the evidence of P.W.1 – Exh. 11 Zubedaben Ibrahim Jogiyat, the complainant and mother of the prosecutrix. She has inter alia testified that the incident had taken place prior to about two years. She has also testified that how the

incident was taken place and after the said incident, she has taken the prosecutrix to Police Station, hospital etc. She has also denied the fact that her daughter, prosecutrix has not got any injury and that she has wrongly implicated the accused at the behest of her relatives. This witness was also subject to cross-examination by the learned advocate for the accused. But nothing substantial has been brought out from her cross-examination which would be of any avail or assistance to the defense and her evidence has remained unimpeachable.

20. It is true that the prosecution has examined Dr. Jyoti Gupta as P.W. - 8 and she has deposed that there was no sign of sexual intercourse. She has also referred to her certificate wherein it was observed that no external marks of injury were seen on body. Axillary and pubic hairs were not developed. Breast was not developed. No marks of external injury were present and hymen was intact, no marks of injury over hymen was found. No injury was seen nor any blood stain was present on external genitals. Vaginal smear taken does not show any living or dead spermatozoa. In her opinion, there

was no evidence suggesting of sexual intercourse.

21. The above evidence of the Doctor is however contrary to the F.S.L. Report which is produced at page 45 of the paperbook. It is clearly stated that blood stains were found on frock. However, semen was not found on the frock. It was further stated that on Paijama of the prosecutrix, blood stains and semen were found. On the shirt as well as pent of the accused, blood stains and semen were found. Similarly, on grass pieces which were collected from the place of incident, blood stains and semen were found.

22. In view of the aforesaid evidence, according to this Court, it is duly proved that the prosecutrix who was minor on the day of the incident was raped and the oral testimony of the prosecutrix which is unimpeachable is sufficient to establish the charge of rape levelled against the accused. Moreover, her oral testimony also gets corroboration from the evidence of P.W.1 – Zubedaben Ibrahim Jogiyat at Ex.11 and F.S.L. Report. Though the medical evidence does not corroborate the charge levelled against the accused, it is settled principle of law

that conviction can be based on oral testimony of prosecutrix without insisting for corroboration if the same inspires confidence. There is no reason for this Court to disbelieve the evidence of the prosecutrix, who is the victim and aged about 8 years old. The alleged enmity between the complainant and the accused is not proved. This was taken only by way of argument which has no foundation at all. In view of the three judgments of the Hon'ble Supreme Court which have been referred to earlier, we are of the view that evidence led by the prosecution to prove the charge against the accused beyond reasonable doubt, more particularly, testimony of the prosecutrix along with F.S.L. Report are capable enough to inspire the confidence of this Court.

23. On close scrutiny of the evidence on record, we find no infirmity in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the learned Additional Sessions Judge, Bharuch. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence as according to us, no other conclusion is possible except the one reached by the learned

Additional Sessions Judge on the facts and in the circumstances of the case.

24. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the learned Additional Sessions Judge is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we fully concur. We do not think it just and appropriate to burden this judgment by reproduction of the said reasoning.

25. In aforesaid view of the matter, according to us, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence passed by the learned Additional Sessions Judge.

26. Before concluding this judgment, we reiterate the well settled principles about this henious crime of rape which shows that the sexual violence is a dehumanising act and it is an unlawful encroachment into the right to privacy and sanctity of woman. The Courts also should be strict

and vigilant to protect the society from such evils. It is in the interest of the society that serious crimes like rape should be effectively investigated.

27. For the foregoing reasons, we find no substance in this appeal and accordingly it is dismissed.

[A. M. KAPADIA, J.]

[K.A. PUJ, J.]

Savariya